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In the
Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Nevada

BRIEF *AMICUS CURIAE* OF MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER

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BRIEF OF MULTISTATE TAX COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae Multistate Tax Commission ("the Commission") respectfully submits this brief in support of the Petitioner, the Franchise Tax Board of the State of California ("FTB").[1] The Commission urges this Court to grant the FTB's petition for certiorari in order to review the decision of the Nevada Supreme Court, which held that the FTB was liable for fraud and intentional infliction of emotional distress related to the FTB's audit of a Nevada plaintiff, and that the cap on statutory damages under Nevada law, applicable to that state's governmental agencies, did not apply to the FTB. *Franchise Tax Bd. of California v. Hyatt*, 335 P.3d 125 (Nev. 2014).

The Commission is the administrative agency for the Multistate Tax Compact, which became effective in 1967. *See United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978) (upholding the validity

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[1] No counsel for any party authored this brief in whole or in part. Only *amicus curiae* Multistate Tax Commission and its member states, through the payment of their membership fees, made any monetary contribution to the preparation or submission of this brief. This brief is filed by the Commission, not on behalf of any particular member state. The parties received timely notice of the *amicus*'s intent to file this brief. The petitioner has granted permission to file this brief, and the respondent has filed a consent to the filing of *amicus curiae* briefs, in support of either party or of neither party.

of the Compact). Today, forty-seven states and the District of Columbia participate in the Commission as compact, sovereignty or associate member states.[2] The Commission comprises the heads of state agencies charged with administering state taxes to which the Compact applies in compact member states.

The purposes of the Multistate Tax Compact (the "Compact") are to: (1) facilitate proper determination of state and local tax liability of multistate taxpayers, including equitable apportionment of tax bases and settlement of apportionment disputes, (2) promote uniformity or compatibility in significant components of state tax systems, (3) facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of state tax administration, and (4) avoid duplicative taxation. Compact, Art. I. The Compact was one response by the states to the need for reform in state taxation of interstate commerce. *See, e.g.*, H.R. Rep. No. 89-952, Pt. VI, at 1143 (1965) and Interstate Taxation Act: Hearings on H.R. 11798 and Companion Bills before Special Subcommittee on State Taxation of Interstate Commerce of the House Committee on the Judiciary, 89th Cong., 2d. Sess. (1966).

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[2] Compact Members are: Alabama, Alaska, Arkansas, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Missouri, Montana, New Mexico, North Dakota, Oregon, Texas, Utah and Washington. Sovereignty Members: Georgia, Kentucky, Louisiana, Michigan, Minnesota, New Jersey, and West Virginia. Associate Members: Arizona, California, Connecticut, Florida, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Wisconsin, and Wyoming.

While the Compact was created to foster increased cooperation among the states and to promote uniformity in taxation of multistate businesses, the states have not relinquished their sovereignty in joining the Compact or participating in the activities of the Commission. The states recognize the benefits of cooperating to identify and solve common problems.

The Commission's interest in this case is two-fold. Allowing private parties to sue state tax agencies in the courts of their sister states, challenging or collaterally attacking tax assessment, enforcement, and collection activities, will disrupt well-settled processes used by states to ensure that revenues are properly and timely collected. This will have a chilling effect on interstate cooperation—epitomized by the states' voluntary participation in the Compact and the Commission—and will threaten core sovereign interests.

SUMMARY OF ARGUMENT

When this case was last before the Court, the question presented was "whether Article IV, § 1, of the Constitution requires Nevada to give full faith and credit to California's statute providing its tax agency with immunity from suit." *Franchise Tax Bd. of California v. Hyatt* (*Hyatt I*), 538 U.S. 488 (2003). The Court held that it did not. *Id.* at 499. In *Hyatt I*, this Court was not asked to reexamine its holding in *Nevada v. Hall*, 440 U.S. 410 (1979), that a state may not assert its sovereign immunity in suits brought by private plaintiffs in the courts of a sister state. *Hyatt*

I, 538 U.S. at 497. The Commission believes, however, that holding must now be reconsidered.

Nevada v. Hall was a personal injury suit brought in California courts against the University of Nevada arising from an automobile accident in California involving an employee of the university. In *Hall*, this Court announced for the first time that a state could not assert sovereign immunity as a defendant in a suit brought by a private plaintiff in the courts of another state. The majority acknowledged that California and Nevada had conflicting sovereign interests—Nevada, to be free from suit without its consent, and California, to assert jurisdiction over matters occurring within its borders. The Court resolved this conflict entirely in favor of the forum state and against Nevada's sovereign immunity interest. Citing *Bank of Augusta v. Earle*, 38 U.S. 519 (1839), the majority noted that when the forum state's interest or policy requires it to restrict the application of comity generally (which would normally counsel dismissal of private suits against sister states), "it has but to declare its will, and the legal presumption is at once at an end." *Hall*, 440 U.S. at 426.

The holding that the forum state need only express its "will" in order to foreclose any defense of sovereign immunity, appears to leave states open to all manner of private suits—even suits that they might never be subject to in their own courts or courts of the federal government. The Commission is confident that states would not allow their own courts to hear collateral attacks on tax determinations in the guise of "fraudulent" assessment claims. Neither would the federal courts' own comity doctrine allow

private suits that might interfere with state tax collection. *Levin v. Commerce Energy*, 560 U.S. 413 (2010). The Commission and its member states have a particular interest in assuring that tax determinations are made according to each state's laws and procedures, which often include limiting jurisdiction to specialized tax tribunals and administrative forums. The fact that states might face private suits challenging their taxing authority in the courts of another state is astonishing.

But in a footnote to the majority opinion in *Hall*, the Court also noted that the personal injury suit there posed "no substantial threat to our constitutional system of cooperative federalism," nor did it present the opportunity to consider whether different state policies might require different analysis or a different result. *Hall*, 440 U.S. at 424 n. 24. This statement has been taken by some as raising the possibility of a different outcome under other circumstances. The dissent in *Hall*, however, was understandably troubled by the implications of the general holding and found the majority's "fragile footnote disclaimer," less than reassuring. *Id.* at 427 (Blackmun, J., dissenting).

This case tests whether the disclaimer suggested by that footnote is not only fragile but truly illusory. As this Court has long recognized, the "highest attribute of sovereignty" is the right to raise revenue, since without it, no other right can be held or enjoyed. *M'Culloch v. State of Maryland et al.*, 17 U.S. 316, 339 (1819). If private suits against state revenue agencies in courts of another jurisdiction do not potentially raise a "substantial threat to our consti-

tutional system of cooperative federalism," then it is hard to imagine anything that will.

The threat posed by this case to the states' long history of interstate tax cooperation may not have been apparent when it was first heard by this Court. This Court allowed this case to proceed to trial based on its understanding that the courts of Nevada would respect California's overwhelming interests in determining its own tax policies. It proved impossible, however, to fairly adjudicate California's liability for "intentional torts" in connection with the decision to audit and assess a taxpayer without first determining if the taxpayer owed the tax which was assessed—a determination that the Commission insists must remain the exclusive province of the California tax tribunals.

While the plaintiff, Hyatt, claimed not to be attempting to contest his California tax liability in the Nevada courts, his suit against the FTB was clearly disruptive to the resolution of that matter. Even more troubling than the prospect of collateral attacks on state tax enforcement, would be the attempt by a private plaintiff to force resolution of some aspect of a taxing state's assessment in a sister-state's forum. While this prospect is obviously obnoxious to cooperative federalism, there appears nothing now that would prevent it, certainly nothing in either *Hall* or *Hyatt I*. This is in contrast with the immunity that states enjoy in federal courts. Even when private plaintiffs seek to vindicate federal rights against violation by states, where there is no question which sovereign's "will" is supreme, those plaintiffs must respect the limits that this Court has

placed on such lawsuits. *See Virginia Office for Prot. & Advocacy v. Stewart*, 131 S.Ct. 1632, 1642-43 (2011)(Kennedy, J., concurring).

After *Hall* and *Hyatt I*, it is clear that the states' core sovereignty interest in collecting tax revenue may be threatened by private lawsuits which could, at the very least, interfere with, disrupt or delay tax enforcement efforts. Moreover, the only protection from this threat is comity, which, under both *Hall* and *Hyatt I*, would still allow the court in the forum state to follow the will expressed by lawmakers in that state rather than the will expressed by the taxing state. The potential for conflict is more than just theoretical. Moreover, that conflict threatens cooperative federalism in an area—tax administration—where such cooperation is essential. Therefore, this Court should revisit *Hall*, and restrict its holding to suits that, unlike this one, do not pose such a threat.

ARGUMENT

I. Certiorari should be granted to consider the impact that lawsuits like this one might have on state tax enforcement, a core element of state sovereignty, and on our system of cooperative federalism.

As the FTB's petition recites, California audited Gilbert Hyatt over twenty years ago to determine whether he had falsely disclaimed his California residency in order to avoid substantial state income taxes. The suit brought by Mr. Hyatt in Nevada courts eventually went before a jury where a judgment against the FTB of almost 500 million dollars was imposed. *See* FTB's Petition for Writ of Certio-

rari, p. 1. While the Nevada Supreme Court has reduced that judgment, it nevertheless affirmed that the FTB was liable for fraud and intentional infliction of emotional distress. *See id.* at pp. 4-12. While such suits have historically been rare, the potential opportunities for them are not.

One of the aspects of our system of federalism is that states are free to adopt different taxes, as their lawmakers and those they represent may choose, and citizens are free to move their residence from one state to another for tax or other reasons. Consequently, questions of residency and the taxes that individuals may owe in particular states, like those at issue in the audit of Mr. Hyatt, are ubiquitous, as are the specific issues that may arise in that context. *See Bicknell v. Jordan*, 321 P.3d 37 (Kan. Ct. App. 2014)(unpublished table opinion)(whether failure to exhaust administrative remedies bars a suit challenging the constitutionality of a tax regulation); *Gaied v. New York State Tax Appeals Trib.*, 6 N.E.3d 1113 (N.Y. Ct. App. 2014)(how a statutory residency rule must be applied); *Severns v. New Mexico Taxation & Revenue Dep't*, No. 31,817, 2013 WL 4516183 (N.M. Ct. App. Apr. 1, 2013) (whether a New Mexico resident changed his domicile to Nevada); *Grede v. Illinois Dep't of Revenue*, 2013 IL App (2d) 120731-U, 2013 WL 1737863 (April 22, 2013); (whether claiming a homestead exemption is an indicium of residency); *Mauer v. Comm'r of Revenue*, 829 N.W.2d 59 (Minn. 2013)(what facts establish tax residency for an individual who travels extensively).

Also, in our system of federalism, states must permit and may not discriminate against interstate com-

merce, nor may they benefit in-state economic interests by burdening out-of-state competitors. *McBurney v. Young*, 133 S.Ct. 1709, 1719 (2013). States may, however, subject interstate commerce to its fair share of state taxes. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). But, of course, this also means that states will necessarily have, as taxpayers doing business in the state, individuals and businesses that may be domiciled elsewhere. So in addition to taxes imposed on individuals based on residency, states must continually respond to challenges brought by out-of-state businesses conducting activities in the state as to the liability of those businesses for income, sales and other types of taxes. *See Ex parte Alabama Dep't of Revenue*, 69 So.3d 144 (Ala. 2010)(whether income from sale of a portion of a business should be apportioned among the states where the taxpayer did business or allocated to the state where the business assets were located); *Harris Corp. v. Arizona Dep't of Revenue*, 312 P.3d 1143 (Ariz. Ct. App. 2013)(same); *Centurytel, Inc. v. Oregon Dep't of Revenue*, 297 P.3d 1264 (Or. 2013)(same).

Regardless of the tax system or the diligence and effectiveness of tax administrators, there will always be a level of noncompliance. When such noncompliant taxpayers are outside a state's borders, this obviously complicates enforcement. State tax administrators, therefore, rely on the cooperation of their sister states to ensure that taxes can be fairly imposed and collected. This cooperation comes in many forms, including assistance in the enforcement of subpoenas to obtain the records, without which tax liability could not be determined, and the ability to

domesticate and enforce judgments as to tax liabilities. *See Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268 (1935)(holding states may not deny full faith and credit to a judgment for taxes); the Uniform Depositions and Discovery Act;[3] and also the Uniform Enforcement of Foreign Judgments Act.[4] States also cooperate in other ways including sharing of information,[5] and agreements to offset tax liabilities.[6] In the context of state tax enforcement, cooperative federalism is not just an ideal, it is imperative. If a taxing state must worry that its sister states' courts might assert the right to adjudicate its tax-related or enforcement matters, this will inevitably create conflicts that may also impact state cooperation.

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[3] Available on the Uniform Law Commission website at: http://www.uniformlaws.org/shared/docs/interstate%20depositions%20and%20discovery/uidda_final_07.pdf

[4] Available on the Uniform Law Commission website at: http://www.uniformlaws.org/shared/docs/enforcement%20of%20judgments/enforjdg64.pdf.

[5] *See* the Federation of Tax Administrators' Uniform Exchange of Information Agreement, http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Events/Annual_Conference/1993FTAUnifromExchangeofInformationAgreement.pdf; and Memorandum of Agreement to combat abusive tax shelters, signed by the states and the Internal Revenue Service and reported in California FTB Press Release, March 4, 2004, https://www.ftb.ca.gov/aboutFTB/press/archive/2004/04_32.shtml

[6] *See, e.g.*, Del. Code Ann.30 § 558(b)(1)-(2), Ky. Rev. Stat. Ann. § 131.230, Tex. Tax Code Ann. § 151.615, Ark. Code Ann. § 26-18-707, N.C. Gen. Stat. Ann. § 105-268.

In addition to substantive tax laws, including whether a state chooses to impose a certain tax or not, special procedural rules for raising a challenge to the imposition or collection of taxes are common and ensure state revenue streams are protected, delays are avoided, and proper regulatory expertise is brought to bear on difficult questions. *Perez v. Ledesma*, 401 U.S. 82, 127 n. 17 (1971)(Brennan, J., concurring in part and dissenting in part)("adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules"). This Court has also long recognized there should be limits on the role of the judiciary in entertaining challenges to the tax and policy decisions of lawmakers. *See, e.g., DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006)(explaining that granting taxpayers standing to press a challenge to the myriad of tax and fiscal decisions states might make would improperly interpose federal courts as "monitors of the wisdom and soundness" of state fiscal administration).

This Court and others have also recognized that the ability to sue a sovereign for redress of a tax related claim requires explicit waiver of sovereign immunity. *U.S. v. Williams*, 514 U.S. 527, 531 (1995)(the task of the Court is to discern the "unequivocally expressed" intent of Congress, construing ambiguities in favor of immunity); *Patterson v. Gladwin Corp. et al.*, 835 So.2d 137 (Ala. 2002)(dismissing a class action suit where immunity for such suits had not been waived); and *Northwall v. State, Dep't of Revenue*, 637 N.W.2d 890 (Neb. 2002)(holding that a suit for declaratory judgment could not be brought in a tax

case). Courts have further recognized that if a state provides for a statutory administrative remedy, that remedy must be exhausted before proceeding to state courts, although the nature of those remedies and extent to which exhaustion is required varies by state. *See Owner-Operators Indep. Drivers Ass'n of Am. v. State*, 553 A.2d 1104 (Conn. 1989)(waiver of sovereign immunity from suit was conditioned upon exhaustion of remedies) and *U.S. Xpress, Inc. v. New Mexico Taxation & Revenue Dep't*, 136 P.3d 999 (N.M. 2006)(no class action may be brought where any member of the putative class has not exhausted administrative remedies).

A particular state's substantive and procedural tax rules would normally apply to all taxpayers, whether based inside or outside the state. For example, the state revenue agency may audit an out-of-state business and propose an assessment. The state's rules might then provide a period of time for the taxpayer to challenge the proposed assessment administratively, before it becomes a final, collectible liability. The state would then provide a process for appealing an adverse administrative decision to the state's courts. All courts in the jurisdiction would, of course, be bound constitutionally and by the doctrine of separation of powers to follow applicable substantive and procedural law in that state. Administrative rulings of the revenue agency would typically be given deference by the state's courts and might be subject to an abuse-of-discretion, or similar standard of review. If the state ultimately prevails, the assessment would become a judgment, enforceable within the state, or subject to domestication and enforcement in the taxpayer's home state under the Full Faith and

Credit Clause. *M.E. White Co.*, 296 U.S. at 278. The decision of an appellate court in the matter would also typically be treated as binding precedent under the doctrine of stare decisis (and federal courts would be bound to follow that interpretation of the state's law, as well) in any case with a similar issue. The same and other related processes for similar kinds of tax disputes (claims for refunds, claims for credits, etc.), with all their attendant governing rules would also apply to instate and out-of-state taxpayers alike.

In short, the rules of each state for contesting and enforcement of taxes create a rational and well-ordered process on which the settled expectations of both tax enforcement personnel and taxpayers rely. But the combination of this Court's decisions in *Hall* and *Hyatt I* threaten disruption and uncertainty. Not only does this threat come from the possible use of a lawsuit brought in a sister state to delay or otherwise interfere with the enforcement of taxes by a taxing state, but it also comes from the possibility that the tax dispute, or some element of it, might be adjudicated outside of the taxing state, and in accordance with other procedural, or perhaps even substantive, rules.

Again, while such suits are rare in state courts, there have certainly been many attempts over the years to circumvent state court jurisdiction and bring state tax related suits in federal court, despite the jurisdictional bar imposed under 28 U.S.C. § 1341 (the Tax Injunction Act) as well as the doctrine of comity. *See Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010); and *Franchise Tax Bd. of California*

v. Alcan Aluminium Ltd., 493 U.S. 331 (1990); *California v. Grace Brethren Church*, 457 U.S. 393 (1982).

Just as states are not compelled to adopt the same substantive rules, they are not compelled to use the same procedure or to afford the same protections to taxpayers. Under *Hall* and *Hyatt I*, there is little certainty as to how potential conflicts between taxing state and forum state rules would be resolved. Neither does there appear to be any reason to think that such conflicts will not occur.

First, if the state audits an out-of-state taxpayer in that taxpayer's home state, the courts of that state would have personal jurisdiction over the taxing state for any case involving the audit itself, and likely the assessment as well. *See Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158 (2d Cir. 2005)(holding that a New York had personal jurisdiction over states for enacting legislation to implement the tobacco Master Settlement Agreement negotiated in New York by states' attorneys general) . Under *Hall*, the taxing state would not be entitled to assert sovereign immunity as a defense to the lawsuit in the taxpayer's home state. The taxing state might also not be entitled to assert that the taxpayer must exhaust administrative remedies in the taxing state before proceeding with the lawsuit.

Under *Hyatt I*, the taxing state would also have no guarantee that the forum state's court would apply all of the substantive or procedural law of the taxing state under the Full Faith and Credit Clause. *Hyatt I* at 494. Unlike the courts in the taxing state, which

are bound to follow the legislative enactments in those states, the courts in the taxpayer's home state may substitute that state's own law or procedures under conflict of law rules. See *Sam v. Sam*, 134 P.3d 761 (N.M. 2006)(holding that the New Mexico rather than the Arizona statute of limitations applied in a case where an Arizona governmental entity was the defendant).

It is true that the taxing state could still institute, in that state, administrative proceedings against the taxpayer, requiring that the taxpayer pursue or waive administrative remedies, leading to a final assessment. The taxpayer might then have the right to appeal that final assessment to the courts in the taxing state. Some states do not require the payment of the assessment before the filing of an appeal, and those states would not be able to collect the tax until the appeal was resolved.

But the outcome of this dual track litigation would be uncertain and would depend on the timing of the judgments in each state and whether either party might assert *res judicata* or collateral estoppel, or otherwise seek to enforce the judgment under the Full Faith and Credit Clause. The precedential effect of a decision from a court in the taxpayer's home state would also be uncertain. It would presumably have force in similar cases in that state, but not in the taxing state's courts, leading to the possibility that taxpayers might be treated differently based on where they are located.

It may well be that in many cases state courts can be depended upon to exercise discretion under the doc-

trine of comity to dismiss cases that involve the adjudication of matters relating to other states' tax laws. Or, even if they do not, those courts may well limit any adjudication to issues not central to the tax determination, or may properly apply the taxing state's law and procedural rules to any tax issues. This would arguably strike a permissible balance under comity, as *Hall* expressed it, since the forum state's only interest would be that its courts have jurisdiction over the matter. But it is not difficult to imagine cases where the forum state would have a separate interest in and connection to the issue.

For example, states typically tax all of the income of their residents and then grant credits for taxes those residents might be required to pay to other states on the same income. This creates a potential conflict of interest between states. When a state asserts the right to tax income earned within its borders by a nonresident, the nonresident's home-state arguably has an interest in the resolution of that issue. If the courts of the nonresident's home-state provide procedural or other benefits to a suit challenging the taxing state's assessment, it is not clear what, including the requirements of comity as expressed in *Hall*, would prevent the nonresident taxpayer from choosing that more favorable forum.

Again, while this scenario may be less likely to occur than suits seeking to delay or interfere with a state's process for assessing or enforcing its taxes, both pose risks that are real and can only be addressed by reexamining the effects of *Hall*.

II. This petition presents the Court with an opportunity to "rebalance" *Hall*, to prevent the threat it poses to core state sovereignty and to cooperative federalism.

In *Hyatt I*, this Court applied its holding in *Hall* to conclude that Nevada's courts could hear a challenge to California's enforcement of taxes. This Court concluded that the Nevada courts had, at least to that point, shown the proper "sensitivity" to California's sovereign interests and that there was no basis to distinguish between the tort claims in *Hall* and the "intentional tort" allegations in the present dispute. *Hyatt I* at 499. In allowing Mr. Hyatt's case against California to proceed, this Court disregarded warnings of the dissenting justices in *Hall* that not recognizing state sovereign immunity from suit, or even subordinating that immunity to the sovereign interests of the forum state, would effectively remove all limits on the ability of private litigants to sue states. Saying: "The Court's expansive logic and broad holding—that so far as the Constitution is concerned, State A can be sued in State B on the same terms any other litigant can be sued—will place severe strains on our system of cooperative federalism," the dissent urged that a limit be found that would avoid this threat. *Hall*, 440 U.S. at 429 (Blackmun, J., dissenting).

The jury is now in, both literally and figuratively, on the possible effects of the Court's holdings in *Hall* and *Hyatt I*, that no harm to the concept of "cooperative federalism" would follow from stripping states of their inherent sovereign immunity from suits in another state. A Nevada jury has awarded Hyatt $490

million in actual and punitive damages, to be paid by the citizens of a neighboring state, based on claims of "fraudulent" auditing and assessment and "intentional infliction of emotional distress" arising out of California's audit of its one-time resident.

CONCLUSION

This case amply demonstrates why immunity from suit is a vital component of any sovereign's ability to govern and to exercise essential government functions, like the collecting of taxes. Allowing the Nevada Supreme Court's decision to stand could be construed as giving this Court's imprimatur of approval to further judicial interventions in the essential activities of sister states in the name of protecting that forum state's interests. Accordingly, the Commission urges this Court to grant the FTB's petition for certiorari.

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